No. 75-1758

In the Supreme Court of the United States

OCTOBER TERM, 1976

THE YPSILANTI PRESS, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1) is not officially reported. The decision and order of the National Labor Relations Board is reported at 219 NLRB No. 30 (Pet. App. A5-A16).

JURISDICTION

The judgment of the court of appeals was entered on April 8, 1976. The petition for a writ of certiorari was filed on June 3, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, in the circumstances of this case, the Board properly rejected petitioner's objections to a representation election without holding an evidentiary hearing.

STATEMENT

1. On August 14, 1974, the Newspaper Drivers and Handlers Local 372 (the "Union"), an affiliate of the International Brotherhood of Teamsters, filed a representation petition seeking certification as the exclusive bargaining agent of petitioner's circulation department employees (A. 4). In November 1974, the Regional Director of the National Labor Relations Board conducted an election among the employees, in which four ballots were cast for the Union, two were cast against it, and two ballots were challenged by the Union (A. 19-20).[1] Petitioner then filed timely objections to the election, alleging that (1) supervisors had been involved in the Union's organizing campaign; (2) the Union had threatened that, if employees did not vote for the Union, they would be fired by petitioner; (3) the Union had stated on election day that it would overturn the election if it lost; and (4) the Union had made statements which led employees to believe that their ballots would not be secret (A. 16-17).

Based on an administrative investigation, the Regional Director sustained one ballot challenge on the ground that the voter had not been on the payroll during the eligibility period;[2] in light of this finding, the other challenge was not resolved because it could not have affected the results of the election (A. 20-21). Additionally, the Regional Director overruled each of petitioner's

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[1]Following a hearing, the Regional Director previously had found that two of petitioner's employees, George Owen and Robert Nordquist, were supervisors and were thus excluded from the unit (A. 10-11). "A." refers to the joint appendix in the court of appeals and "S.A." to the supplemental appendix to the Board's brief in the court of appeals. A copy of each is being lodged with the Clerk of this Court.

[2]This finding is not in issue here.

objections to the election, making the following findings and conclusions:

Objection 1: Prior to the hearing on their supervisory status (see p. 2, n. 1, *supra*), and, indeed, prior to the filing of the petition for an election, supervisors Owen and Nordquist had suggested that other employees attend the Union's first organizational meeting. They also attended the meeting, and Nordquist drove one employee there (A. 22). Owen later obtained an authorization card from one employee who was not eligible to vote in the election (A. 23). On October 22, 1974, a month before the election, Owen was discharged by petitioner,[3] but he thereafter continued to solicit and secure other employee signatures (*ibid.*).

In the first half of September 1974, Nordquist informed Circulation Director Leo Munao that he and Owen had been the "spearheads" of the union drive (A. 26). Petitioner took no steps to prevent their organizing activity, nor did it inform its employees that it disapproved of the supervisors' actions (A. 26). Rather, petitioner conducted a vigorous anti-Union pre-election campaign and assured its employees that they could "work and talk against" the Union if they so desired (A. 26-27).[4]

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[3]Conflicting reasons for Owen's discharge were advanced in the election campaign. The Union contended that he was fired for union activity, while the Company contended that he was fired for cause. Since Owen was a supervisor, his discharge for union activity would not have violated the National Labor Relations Act, and the Regional Director therefore did not have to resolve the question of the reason for the discharge in refusing to issue a complaint based on his discharge (S.A. 3).

[4]Thus, a letter sent to the employees stated (A. 27):

> Question: If I am opposed to a union here at the Press, will I get into trouble if I work and talk against the Teamsters? Answer: No. You and every district manager can talk and work for or against the union. The law protects your right to express your opinion.

In view of Nordquist's and Owen's lack of supervisory authority over unit employees,[5] the vigorously contested and close question of their supervisory status, Nordquist's minimal involvement in union activity after the filing of the election petition, the nonsupervisory status of Owen when he solicited for the Union following his October 22 discharge, petitioner's inaction when advised of their organizational activity, and its own vigorous campaign against the Union, the Regional Director concluded that Nordquist's and Owen's union activity had not impaired the employees' free choice in the representation election (A. 22-27).

Objections 2 and 4: At a meeting with petitioner's employees on November 18, 1974, Union representative Elton Schade stated that supervisor Owen had been fired for union activity (A. 27). Schade also said that, because of the small size of the unit, petitioner was aware of who was for the Union and who was against it and was in the process of discharging union supporters. Schade asked the employees to vote for the Union in order to protect themselves (*ibid.*). Following these comments, an employee asked how petitioner would be aware of an individual employee's feelings about the Union since the election would be conducted by secret ballot. Another unit employee, who had formerly been a supervisor, responded that petitioner knew who was for the Union and that it frequently took "straw ballots" (A. 29).

The Regional Director concluded that the Union's assertions were typical campaign propaganda which the employees were capable of evaluating as such (A. 27-28). He noted that employees are aware that unions

[5]Nordquist and Owen did not supervise the day-to-day work of unit employees, but performed complementary work of a similar nature (A. 24-25).

generally have no access to an employer's reasons for discharge, that petitioner's claim that Owen had been fired for cause was well known, and that employees recognize that union predictions concerning future employer conduct are beyond the power of the union to fulfill (A. 28). The Regional Director also concluded that the employees' first-hand observation of the election held by the Board would have allayed any fears about the secrecy of their ballots (A. 29).

Objection 3: At a conference held just prior to the beginning of the election, Union representative Schade accused petitioner of having threatened employees with discharge should they attempt to vote and stated that, because these threats had been prejudicial to the holding of a free election, the Union would file objections if it lost the election and would thereby cause the election to be set aside (A. 28). The Regional Director found that this statement amounted to nothing more than an announced determination to use the Board's objection procedures and did not constitute improper electioneering that would impair a fair election (A. 28).

Accordingly, the Regional Director overruled petitioner's objections and certified the Union as the bargaining representative of petitioner's circulation department employees (A. 29-30). On March 5, 1975, petitioner filed exceptions with the Board, contending that its objections should have been sustained and the election vacated or, in the alternative, that a hearing should have been held on its objections (A. 31-65). On April 4, 1975, the Board denied petitioner's request for review (A. 83). When petitioner continued to refuse to recognize the Union, the Board concluded on July 18, 1975, that petitioner had violated Section 8(a)(5) and (1) of the National Labor Relations Act, as amended, 61 Stat. 140, 29 U.S.C. 158(a)(5) and (1), and ordered

petitioner to bargain with the Union upon request (Pet. App. A5-A14).[6]

2. The court of appeals upheld the Board's decision and enforced its order. On the basis of prior decisions of the Sixth Circuit, the court concluded that "the election objections of [petitioner] were properly overruled without a hearing, * * * and that substantial evidence on the record as a whole supports the certification of the union" and the Board's finding that petitioner had committed an unfair labor practice (Pet. App. A1).

ARGUMENT

1. Petitioner contends that it was entitled to an evidentiary hearing on its objections to the representation election. Although the National Labor Relations Act does not provide for post-election hearings to resolve challenges or objections to an election, Section 102.69(d) of the Board's Rules and Regulations, 29 C.F.R. 102.69(d), provides for a hearing where an administrative investigation reveals that "substantial and material factual issues exist." Thus, the sole question presented is whether the Board properly concluded that petitioner's objections raised no "substantial and material factual issues" and could be determined without the necessity for an evidentiary hearing. This issue, which depends upon an evaluation of the particular facts of this case, does not warrant review by this Court.

In any event, the Board acted properly in denying a hearing. In order to raise a substantial and material factual issue under 29 C.F.R. 102.69 (*National Labor Relations Board* v. *Tennessee Packers, Inc.*, 379 F. 2d 172, 178 (C.A. 6), certiorari denied, 389 U.S. 958)—

[6]Chairman Murphy dissented, stating that she would have directed a hearing on petitioner's Objection 1 (Pet. App. A14).

> it is necessary for a party to do more than question the interpretation and inferences placed upon the facts by the Regional Director. * * * It is incumbent upon the party seeking a hearing to clearly demonstrate that factual issues exist which can only be resolved by an evidentiary hearing. The exceptions must state the specific findings that are controverted and must show what evidence will be presented to support a contrary finding or conclusion. * * * Mere disagreement with the Regional Director's reasoning and conclusions do not raise "substantial and material factual issues."

See also *National Labor Relations Board* v. *Southern Health Corp.*, 514 F. 2d 1121, 1126 (C.A. 7); *National Labor Relations Board* v. *Modine Manufacturing Co.*, 500 F. 2d 914, 915 (C.A. 8); *National Labor Relations Board* v. *Kenny*, 488 F. 2d 774, 775-776 (C.A. 9).

Here, petitioner did not dispute the underlying facts found by the Regional Director, but merely contested the inferences and legal conclusions drawn from those facts. But as this Court noted in *Radio Officers Union* v. *National Labor Relations Board*, 347 U.S. 17, 48-49, quoting from *Republic Aviation Corp.* v. *National Labor Relations Board*, 324 U.S. 793, 798, 800, "the statutory plan for an adversary proceeding 'does not go beyond the necessity for the production of evidential facts. * * * An administrative agency * * * may infer within the limits of the inquiry from the proven facts such conclusions as reasonably may be based upon the facts proven.' "

Moreover, contrary to petitioner's contention (Pet. 8), the Board was not required to demonstrate the actual effect of the pre-election conduct in question, but needed only to make an intelligent judgment, based upon its expertise, concerning the likely impact of that conduct

on the employees. In this inquiry, as the court of appeals held in *National Labor Relations Board* v. *Southern Health Corp., supra,* 514 F. 2d at 1126, an evidentiary hearing would have been of little probative value:

> Testimony by voters as to their motivation in voting is likely not to be satisfactory or useful. Cf. N.L.R.B. v. Gissel Packing Co., 395 U.S. 575, 608 * * *. The more likely character of evidence tending to show that a particular statement probably had an impact on the outcome would be evidence that an issue to which it related was hotly contested and an important concern of the electorate, evidence bearing upon the degree to which the relevant facts are known among the group involved, and evidence tending to establish the magnitude of the alleged misrepresentation.

The Regional Director took these and others factors into consideration in overruling petitioner's objections, and the Board's determination to adopt those findings without an evidentiary hearing was not an abuse of discretion. See *Harlan No. 4 Coal Co.* v. *National Labor Relations Board,* 496 F. 2d 117, 122-123 (C.A. 6), certiorari denied, 416 U.S. 986; *National Labor Relations Board* v. *Clearfield Cheese Co.,* 322 F. 2d 89, 93-94 (C.A. 3).

Nor does the decision below conflict with the cases cited by petitioner (see Pet. 8, n. 6), each of which is distinguishable on its facts. Unlike here, the record in those cases was barren of any indication or inference that the employees had the requisite knowledge to evaluate the false pre-election propaganda effectively. In *National Labor Relations Board* v. *A.G. Pollard Co.,* 393 F. 2d 239, 241-242 (C.A. 1), for example, Stashio, the union's leading nonprofessional organizer, had informed a

"significant number" of unit employees on the night before and the morning of the representation election that, in a previous election in which he had been involved, the company had discharged nine of sixteen employees after the union had lost the election. The court there held that the statements may have had a significant impact on the voters in the election, who had no other knowledge of the subject matter of Stashio's representations. In the instant case, on the other hand, the Union's allegations concerning the discharge of Owen had been part of an open debate between the Union and petitioner about petitioner's treatment of a supervisor known to each of the unit employees.[7]

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[7]Furthermore, petitioner's assertion (Pet. 8) that Union representative Schade's comments (see p. 4, *supra*) were "*prima facie* objectionable" and hence warranted a hearing to determine the impact that such allegedly improper conduct had on the employees rests on a characterization of those remarks that was neither accepted by the Board or the court of appeals nor supported by the evidence.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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